Supreme Court, U.S.
FILED

09-781 DEC 24 2009

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No. _____

IN THE

Supreme Court of the United States

STATE OF MINNESOTA,
Petitioner,

v.

DANON JASON RUSSELL,
Respondent.

Petition For Writ Of Certiorari
To The Court Of Appeals Of Minnesota

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Police obtained a search warrant for defendant/respondent Danon Russell's DNA, to compare it to the DNA found on a gun that a witness saw Russell handling. The witness did not know Russell's name; police obtained his name in a stop that was later held illegal. Under *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984), and the exclusionary rule, is police knowledge of a suspect's identity suppressible if the knowledge came from an illegal stop?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Minnesota, respectfully requests that this Court issue a writ of certiorari to review the judgment of the Minnesota Court of Appeals in this case.

OPINION BELOW

The opinion of the Minnesota Court of Appeals is unpublished. *State v. Russell*, 2009 WL 2151098 (Minn. Ct. App. 2009); Appendix ("App.") 1. The Minnesota Supreme Court denied the state's petition for further review on September 29, 2009.

JURISDICTION

The Minnesota Court of Appeals issued its decision on July 21, 2009; judgment was issued on October 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case presents a question under the Fourth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On August 4, 2006, police went to a "problem property" where numerous arrests had been made. They arrested Benjamin Danielski for possession of methamphetamine, and found a gun in his car. An officer stopped defendant/respondent Dannon Russell – who had earlier hurried into the house when officers arrived – to get his name. Russell gave a fake name, and a birth date that did not match how old he said he was. Handcuffed, he admitted his real name and that there were outstanding warrants for his arrest.

Danielski later told police he had seen Russell with the gun. Police applied for a search warrant to obtain Russell's DNA. Minnesota Judge of District Court William H. Leary, III found probable cause and issued the warrant. Tests showed that Russell's DNA profile was the predominant profile on the gun.

Charged with possession of a firearm by an ineligible person, Russell argued that the police illegally stopped him and that the search warrant for his DNA was not supported by probable cause. Minnesota District Court Judge James H. Clark, Jr., denied Russell's motion to suppress. A jury trial resulted in Russell being found guilty, and sentenced to the mandatory minimum 60-month term.

On direct appeal, the Minnesota Court of Appeals reversed. It held that the police stop of Russell was unlawful, but for the stop the officers would not have learned Russell's identity, and without knowledge of his identity the officers could not have obtained a search warrant for his DNA, so the DNA evidence

must be suppressed. It rejected the state's argument that under *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984), and the exclusionary rule, knowledge of identity cannot be suppressed. *State v. Russell*, 2009 WL 2151098 (Minn. Ct. App. July 21, 2009); App. 1, 7-11. On September 29, 2009, the Minnesota Supreme Court denied the state's petition for further review.

REASONS FOR GRANTING THE PETITION

This case presents this Court with an opportunity to answer a recurring, important question on which lower courts are split: Is identity-related evidence suppressible? The answer to this question depends, at least in part, on the proper interpretation of the following oft-debated language in *I.N.S. v. Lopez-Mendoza*: "[t]he 'body' or *identity* of a defendant or a respondent in a *criminal* or civil proceeding *is never itself suppressible as a fruit of an unlawful arrest* . . .." 468 U.S. 1032, 1039 40 (1984) (emphasis added). The Fourth Circuit Court of Appeals has noted that the "meaning of the *Lopez-Mendoza* 'identity statement' has bedeviled and divided our sister circuits." *United States v. Oscar-Torres*, 507 F.3d 224, 228 (4th Cir. 2007).[1]

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[1] The state is not seeking review of the validity of the stop here, which just involves the application of well-established law to unique facts. If this Court grants review and reverses the court of appeals, it would be appropriate to remand for determination of whether the search warrant application established probable cause, an issue the court of appeals did not reach. App. 11.

The majority, but not all, of the federal circuits have rejected the Minnesota Court of Appeals' erroneous conclusion that knowledge of identity is subject to suppression. These courts have either held that *Lopez-Mendoza* means what it says – that the identity of a defendant in a criminal case is never itself suppressible – or that knowledge of identity is otherwise not subject to the exclusionary rule. *See United States v. Bowley*, 435 F.3d 426 (3rd Cir. 2006); *United States v. Navarro-Diaz*, 420 F.3d 581 (6th Cir. 2005); *United States v. Del Toro Gudino*, 376 F.3d 997 (9th Cir. 2004), *cert. denied*, 543 U.S. 1170 (2005); *Navarro Chalan v. Ashcroft*, 359 F.3d 19 (1st Cir. 2004); *United States v. Roque Villanueva*, 175 F.3d 345 (5th Cir. 1999); *United States v. Adegbite*, 846 F.2d 834 (2nd Cir. 1988), *cert. denied*, 493 U.S. 956 (1989); *see also, e.g., People v. Cobb*, 703 N.Y.S.2d 341 (N.Y. Crim. Ct. 1997); *People v. Panfili*, 145 Cal. App. 3d 387 (Cal. Ct. App. 1983).

The Minnesota Court of Appeals – relying on cases from the 8th, 10th, and 11th Circuits – concluded that *Lopez-Mendoza* simply stands for the legal principle that "illegal police activity does not affect the court's jurisdiction or require dismissal of the prosecution, but illegal police activity may affect the admissibility of evidence." App. 10-11 (citing *United States v. Farias Gonzalez*, 556 F.3d 1181 (11th Cir. 2009); *United States v. Olivares-Rangel*, 458 F.3d 1104 (10th Cir. 2006); *United States v. Rodriguez-Arreola*, 270 F.3d 611 (8th Cir. 2001)); *see also, e.g., Oscar-Torres*, 507 F.3d 224 (4th Cir. 2007); *United States v. Mendoza-Carrillo*, 107 F. Supp. 2d 1098 (D.S.D. 2000). The court concluded that, "although identity itself is not

suppressible, evidence of identity is suppressible. Here, [Russell's] statement made after his unlawful seizure is evidence of his identity. Because this statement is a fruit of the poisonous tree, the district court erred by not suppressing the statement." App. 11.

The flaw in the court's rejection of *Lopez-Mendoza* is that the officers' stop of Russell did not yield any evidence to be used against him; it just resulted in the officers learning his identity. The state has never attempted to introduce any physical evidence obtained at the time of the stop or the substance of any statements Russell made. The probable-cause portion of the search warrant that yielded Russell's DNA does not contain any evidence obtained from the stop. The stop simply provided the police with knowledge of Russell's identity.[2]

It is clear that Fourth Amendment violations cannot serve to shield someone from prosecution when identity was discovered during the course of the stop. See *United States v. Crews*, 445 U.S. 463, 474 (1980) (holding that illegal arrest is not a bar to prosecution, and that a person is not himself evidence that can be

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[2] Russell has consistently argued that the issue here "is no different than any other challenged piece of evidence the police acquired only by violating a defendant's Fourth Amendment right." Response in Opposition to the State's Petition for Further Review at 6. Russell ignores that nothing in his statement to the police was used against him; the statement just provided the police with knowledge of his identity. If Russell is tried, the state will not need to mention the stop at all; it will simply have to prove that Russell is ineligible to possess a firearm, and that he did so, as evidenced by the DNA found on the gun and Danielski's statement that he saw Russell holding the gun.

suppressed). The most logical reading of *Lopez-Mendoza and Crews* is that knowledge of identity is not suppressible. *See, e.g., Navarro-Diaz*, 420 F.3d at 585 88). As the Third Circuit Court of Appeals has stated, it is unlikely that this Court would lightly use the sweeping language in *Lopez-Mendoza* that the identity of a defendant in a criminal proceeding "is never itself suppressible." *Bowley*, 435 3d at 430.

Further, numerous courts have held that the existence of an outstanding arrest warrant dissipates any taint from an illegal initial detention; these arrest-warrant cases illustrate the principle that knowledge of identity is not subject to suppression. *See, e.g., United States v. Green*, 111 F.3d 515 (7th Cir.) ("It would be startling to suggest that because the police illegally stopped an automobile, they cannot arrest an occupant who is found to be wanted on a warrant – in a sense requiring an official call of 'Olly, Olly, Oxen Free.'"), *cert. denied*, 522 U.S. 973 (1997); *State v. Walker-Stokes*, 903 N.E.2d 1277 (Ohio Ct. App. 2008); *People v. Reese*, 761 N.W.2d 405 (Mich. Ct. App. 2008); *McBath v. State*, 108 P.3d 241 (Alaska Ct. App. 2005); *People v. Murray*, 728 N.E.2d 512 (Ill. Ct. App. 2000); *State v. Hill*, 725 So.2d 1282 (La. 1998); *Ruffin v. State*, 412 S.E.2d 850 (Ga. Ct. App. 1991); *Reed v. State*, 809 S.W.2d 940 (Tx. Crim. App. 1991); *State v. Lamaster*, 652 S.W.2d 885 (Mo. Ct. App. 1983); *People v. Hillyard*, 589 P.2d 939 (Colo. 1979); *State v. Rothenberger*, 440 P.2d 184 (Wash. 1968). There is no principled basis for a holding that illegally-obtained knowledge of identity can be used to make an arrest on an outstanding warrant, but cannot be used to put a name on a search warrant.

In *Farias-Gonzales*, a case relied on by the court of appeals, the Eleventh Circuit explained that:

> [A]llowing a criminal defendant to use the exclusionary rule to exclude evidence of his identity achieves the same result as would allowing him to suppress the court's jurisdiction over him. While Farias-Gonzalez does not seek to prevent the court from summoning him before it, he does seek to prevent the Government from showing who he is when he appears before it. If Farias-Gonzalez can suppress the Government's evidence of who he is, then he has accomplished the same thing he would have accomplished had he suppressed the ability of the court to exercise jurisdiction over him.

556 F.3d at 1188. Similarly, preventing the state from putting Russell's name on a search warrant effectively suppresses jurisdiction over him.[3]

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[3] Russell may argue that exclusion is necessary to deter violations of the Fourth Amendment. The Eleventh Circuit has persuasively rebutted such an argument: "[C]ivil suits provide deterrence for searches and seizures that violate the Fourth Amendment. Since identity-related evidence is collectible without implicating the Fourth Amendment, Fourth Amendment violations will only occur when there is an unconstitutional search or seizure prior to the collection of the identity-related evidence. Thus, officers seeking to obtain identity-related evidence will gain nothing by violating a suspect's constitutional rights . . .." *Farias-Gonzales*, 556 F.3d at 1189. Further, the suppression of any physical evidence obtained in an illegal search will continue to deter police officers from violating the Fourth Amendment, even if this Court holds that knowledge of identity cannot be suppressed.

The constitutional question presented here is not only an important one – on which the federal circuits are split – but it is also one that is likely to reoccur, as evidenced by the number of cases across the country dealing with it, especially in situations where an illegal stop leads to discovery of an arrest warrant. This Court should grant certiorari to resolve the ongoing debate over the proper reading of *Lopez-Mendoza* and the application of the exclusionary rule to knowledge of identity.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Dated: December 24, 2009

Respectfully submitted,

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This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2008).

STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1255

State of Minnesota, Respondent,

vs.

Danon Jason Russell, Appellant.

Filed July 21, 2009
Reversed
Halbrooks, Judge

Ramsey County District Court

File No. 62-K6-07-003492

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Considered and decided by Halbrooks, Presiding Judge; Toussaint, Chief Judge; and Willis, Judge.*

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant Danon Russell challenges the district court's refusal to suppress the evidence against him, arguing that (1) the police unlawfully seized him and (2) a witness's statement was insufficient to establish probable cause to support the search warrant that permitted the police to obtain a sample of his DNA. Because we conclude that appellant was not lawfully seized, we reverse.

FACTS

Officers Robert Buth and Trygve Sand of the St. Paul Police Department routinely patrol the city's East District. When not responding to a call, Officers Buth and Sand regularly drive by a list of addresses that they have identified as "problem properties" or "high-crime areas" that have yielded "numerous arrests in the past." The residence at 853 York Avenue East (the York house) is one of these addresses. The resident there, M.P., was known to Officer Buth as a person involved in the scrap-metal trade and a sometime copper thief. Officer Buth had been to the York house at least 20 times during the preceding one-and-a-half years that M.P. had lived there. The visits had resulted in the recovery of approximately five stolen vehicles and approximately ten arrests for outstanding warrants, auto theft, and drug-related crimes.

On August 4, 2006, at about 3:30 p.m., Officers Buth and Sand, who were uniformed and in a marked squad car, drove by the York house. They approached the house from the alley and observed M.P. with two white males and one black male. The men with M.P. were unknown to the officers. About 20 seconds after the officers and the men were visible to each other, the three unidentified men walked quickly into the York house. Officer Buth testified that he "wouldn't say [the men] ran." Officer Buth did not observe the men alert each other to the police arrival, attempt to conceal anything from the police officers, or conduct any hand-to-hand transactions.

The officers called M.P. over to their squad car and inquired as to who the other three men were. M.P. identified one of the white males as "Morrison" and the black male as "D." M.P. was unable to give a name for the other white male. While the officers were talking to M.P., the unidentified white male came out of the house by a side door and began walking toward the front of the house. The officers drove around the block to the front of the York house and saw that the male had taken a small canvas bag from a vehicle parked in front and was walking back toward the house. The officers stopped the man, searched the bag, and found what appeared to be "a meth kit." The officers arrested the man, who was identified as Benjamin Danielski.

Officer Buth then approached the house to identify the other two men. By the front gate, Officer Buth encountered the black male whom M.P. had identified only as "D." Officer Buth testified that D knew the officers were there, because he had likely been watching

the officers arrest Danielski and was standing outside the house. The man did not try to flee or evade the officer. Officer Buth grabbed D by the arm, which the officer testified was his normal practice "only to avoid a foot chase." Other than D's presence at the York house, Officer Buth said he had no specific information tying D to Danielski or to drug activity. Officer Buth asked D what his name, age, and date of birth were. D said his name was "Treyvon," that he was 22, and that he was born in July 1982. D's response made Officer Buth suspicious because he thought the nickname "D" would correspond to a first name that started with that letter and because the given birth date would make him 24, not 22. The officer handcuffed D and escorted him to the squad car. At that point, D admitted that his real identity was Danon Jason Russell and that there were outstanding warrants for his arrest.

The officers also sought to determine who owned the vehicle from which Danielski had presumably retrieved the meth kit. Danielski said that he had recently purchased the vehicle but did not have documentation, so Officer Buth decided to have the vehicle towed. The officers first performed an inventory search and found a handgun in a duffel bag in the trunk.

The next day, Danielski gave a recorded statement in which he stated he had seen the handgun in appellant's possession before. Based on Danielski's statement, as well as the initial encounter at the York house, the police applied for and received a search warrant to collect a sample of appellant's DNA for

comparison to the DNA obtained from the handgun. Appellant's DNA was determined to be a match to the DNA recovered from the handgun.

Appellant was charged with possession of a firearm by an ineligible person, in violation of Minn. Stat. § 624.713, subd. 1(b) (2006). He moved to suppress the evidence against him on the grounds that (1) he was unlawfully seized and (2) the search warrant used to obtain his DNA was not supported by probable cause. The district court denied the motion, and a jury convicted appellant. This appeal follows.

DECISION

A. The seizure was unlawful.

On appeal from a reasonable-suspicion determination supporting a seizure, we review the district court's findings of fact for clear error, but review its ultimate determination de novo. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). And when reviewing an order on a motion to suppress evidence, we "may independently review the facts and determine, as a matter of law, whether the district court erred." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

Both the United States and Minnesota constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The state constitution affords Minnesotans greater protection in this area than the federal constitution. *State v. Askerooth*, 681 N.W.2d 353, 361–63 (Minn. 2004)

(discussing cases in which the supreme court determined Minn. Const. art. I, § 10 afforded greater protection). Under the Minnesota Constitution, police officers "must be able to articulate reasonable suspicion justifying [a] seizure, [or] else any evidence that is the fruit of the seizure is suppressible." *In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993). Reasonable suspicion is "not the product of mere whim, caprice or idle curiosity, but [is] based upon specific and articulable facts." *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996) (quotation omitted).

A person's mere presence in a high-crime area or mere association with a known criminal is insufficient to establish reasonable suspicion. *State v. Varnado*, 582 N.W.2d 886, 890 (Minn. 1998); *see also E.D.J.*, 502 N.W.2d at 780, 783 (rejecting reasonable suspicion based on presence near a location known for criminal activity). But a person's evasive conduct around police, especially when coupled with his presence in a high-crime area, can create reasonable suspicion. *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992). In *Dickerson*, the suspect left a known crack house walking in one direction but abruptly changed direction after making eye contact with police officers who were in a nearby squad car. *Id.* at 842.

Here, the district court identified the York house as a high-crime area and cited two facts as evidence of appellant's evasive conduct: that he "was observed immediately going inside" the York house when the officers drove up and that he emerged once Danielski, carrying the meth kit, had been arrested.

Appellant challenges the district court's characterization of his behavior as evasive conduct.[1] Although appellant did go inside the house almost immediately upon the police officers' arrival, there is no evidence that anyone in the group signaled the others that the police were near. Nor did appellant run inside; he merely walked quickly. And appellant did not attempt to conceal anything from the officers as he went inside. The officers saw Danielski leave the building while they were talking to M.P., but they did not see appellant leave. And when Danielski was being arrested in front of the house, appellant did not try to leave from the back. Instead, he stood outside and watched the arrest take place. When Officer Buth approached appellant, appellant did not try to flee. Neither in comparison to Dickerson, nor in light of the common understanding of the meaning of the word "evasive,"[2] is this evasive conduct that supports a determination of reasonable suspicion.

Officer Buth offered no other basis for his seizure of appellant. The district court therefore erred as a matter of law in determining that the seizure was lawful.

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[1] Appellant also questions the determination that the York house is a high-crime area. But whether a location is in a high-crime area is not dispositive; the inquiry focuses on whether the suspect engages in evasive conduct. Dickerson, 481 N.W.2d at 843.

[2] The root verb "evade" means to "escape or avoid by cleverness or deceit." *The American Heritage Dictionary of the English Language* 634 (3d ed. 1992).